NO. 48384-0

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

v.

DARCUS ALLEN, RESPONDENT

Appeal from the Superior Court of Pierce County
The Honorable Katherine Stolz

No. 10-1-00938-0

OPENING BRIEF

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A. ASSIGNMENT OF ERROR

The trial court incorrectly dismissed the RCW 10.95 sentencing factors charged in defendant's noncapital case as barred from retrial by double jeopardy. That decision misapplied ***Alleyne's***[1] limited expansion of the Sixth Amendment jury trial right to extend Fifth Amendment double jeopardy protection to those sentencing factors despite binding precedent that strictly limits the protection to sentencing factors in capital cases.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Did the trial court mistreat defendant's RCW 10.95.020 sentencing factors as elements of an aggravated murder offense when Washington's Supreme Court has repeatedly rejected that interpretation?

2. Was ***Alleyne's*** Sixth Amendment holding misapplied to extend Fifth Amendment double jeopardy protection to defendant's noncapital RCW 10.95.020 sentencing factors in violation of binding double jeopardy precedent?

3. Were the negative special verdict findings entered at the first trial wrongly treated as "acquittals" since their retrial is specifically authorized by controlling precedent?

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[1] ***Alleyne v. United States***, __ U.S. __, 133 S. Ct. 2151(2013).

C. STATEMENT OF THE CASE

Defendant was charged with four counts of premeditated murder pursuant to RCW 9A.32.030(1)(a) for helping Maurice Clemmons fatally shoot four police officers on November 29, 2009. ***State v. Allen***, 178 Wn. App. 893, 900-01, 317 P.3d 494 (2014) *rev'd on other grounds*, 182 Wn.2d 364, 369, 341 P.3d 268 (2015); CP 1-4. Each murder was charged with aggravating circumstances under RCW 10.95.020(1) and subpart (10). *Id.*[2] Defendant's maximum potential sentence was life without the possibility of release because a death notice was not filed. The jury convicted him of all four counts of premeditated murder, answered the RCW 10.95 special verdicts "no", but answered "yes" to the RCW 9.94A.535(3)(v) aggravator, authorizing defendant's exceptional sentence. ***Allen***, 182 Wn.2d at 373 This Court affirmed the convictions and sentence. ***Allen***, 78 Wn. App. at 900-01. The Supreme Court reversed that decision for a closing-argument error and remanded the case for a new trial. ***Allen***, 182 Wn.2d at 387. The RCW 10.95 sentencing factors were not addressed.

On remand, defendant made a motion to dismiss the RCW 10.95 sentencing factors that claimed:

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[2] The State also alleged the RCW 9.94A.535(3)(v) aggravating circumstance that authorized the trial court to sentence defendant above the standard range if the jury found (1) the victims were police officers who were performing their official duties at the time of the offense, (2) defendant knew the victims were police officers, and (3) the victims' status as police officers were not elements of the offense. ***Allen***, 182 Wn.2d at 370-71. The 9.94A.535(3)(v) sentencing factor is not at issue in the State's appeal.

> the Double Jeopardy Clause prohibits the State from re-trying [him] for either ... aggravating circumstance[] because ... first degree murder is a lesser-included offense of aggravated first degree murder, and ... the jury returned unanimous verdicts of acquittal on the aggravator....

CP 103. Defendant argued the ***Apprendi-Alleyne*** cases transformed those sentencing factors into elements of an aggravated murder offense to which double jeopardy protection applied. CP 107-10 (citing ***Apprendi v. New Jersey***, 530 U.S. 466, 494 n. 19, 120 S. Ct. 2348 (2000)); ***Alleyne***, 133 S. Ct. at 1255; RP (8/7/15) 4-7. The State objected because controlling precedent withholds double jeopardy protection from sentencing factors in noncapital cases. CP 117, 119-24; RP (8/7/15) 11-12. The trial court read ***Alleyne*** to hold the RCW 10.95 aggravating circumstances:

> "are elements, not just aggravating factors; and since the jury ... said no, and all affirmed that ... was ... their unanimous opinion, double jeopardy attach[ed] to those factors. They're elements of the crime according to the Supreme Court; and we are obliged to follow the Supreme Court. ... ***Alleyne*** basically does reverse the prior line of cases in this state. ...

RP (8/7/15) 13-15. The same result followed the State's motion for reconsideration. CP 160-69, 173-74; RP(10/13/15) 4-10.

This Court granted discretionary review, concluding:

> [] Both the United States Supreme Court and our Supreme Court have held ... double jeopardy is applicable in the capital sentencing context, but not in noncapital sentencing proceedings. ... [T]he trial court's reliance on *Alleyne* is misplaced.... *Alleyne* is an extension of the *Apprendi* line of cases .... Our Supreme Court has explicitly stated the *Apprendi* rule is "for the purposes of the Sixth Amendment

> and that the *Apprendi* line of cases do not impact double jeopardy analysis under the Fifth Amendment...." The trial court committed probable error in concluding ... *Alleyne* extended to double jeopardy analysis of aggravating factors in noncapital cases....

CP 177, 181-88.

D. ARGUMENT

Fundamental to the Supreme Court's doctrine of judicial restraint is its unwillingness to unnecessarily reach constitutional questions. ***Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.***, 467 U.S. 138, 157-58, 104 S. Ct. 2267 (1984). Decisions are limited to the case before the Court as defined by the Court. ***Ashwander v. TVA***, 297 U.S. 288, 339, 56 S. Ct. 466, 479 (1936). Even core questions of judicial business will not be reached "unless ... indispensably involved in a ... litigation. And then, only to the extent ... so involved." ***Youngstown Sheet & Tube Co. v. Sawyer***, 343 U.S. 579, 594, 72 S. Ct. 863 (1952). Strict adherence to these rules accords with the special weight carried by the Court in maintaining federal-state relations. ***Clay v. Sun Ins. Office Ltd.***, 363 U.S. 207, 211-12, 80 S. Ct. 1222 (1960).

Meanwhile, the Court has "[t]ime and time again ... recognized that the doctrine of *stare decisis* is of fundamental importance to the rule of law." ***Hilton v. S. Carolina Pub. Railways Comm'n***, 502 U.S. 197, 202, 112 S. Ct. 560 (1991). "Adherence to precedent promotes stability,

predictability, and respect for judicial authority." *Id.* "For all of these reasons, [the Court] will not depart from the doctrine of *stare decisis* without some compelling justification." *Id.*; ***Teague v. Lane***, 489 U.S. 288, 332, 109 S. Ct. 1060, 1087, 103 L. Ed. 2d 334 (1989). *Stare decisis* has added force when states have acted in reliance on previous decisions, for overruling them would require an extensive legislative response. *See* ***Hilton***, 502 U.S. at 202.

The trial court nevertheless concluded the ***Alleyne*** Court's narrow extension of Sixth Amendment trial rights to minimum penalty factors was intended to upend settled Fifth Amendment double jeopardy precedent—*sub silentio*—without a double jeopardy question before it, a *stare decisis* analysis or any mention of the Double Jeopardy Clause. That reading of ***Alleyne*** is untenable, for it forces one to accept the Court haphazardly left the state and federal courts to guess at whether they are violating double jeopardy rights by continuing to adjudicate statutory sentencing provisions in accordance with double jeopardy precedent. Errors of law are reviewed *de novo*. ***State v. Bryant***, 78 Wn. App. 805, 809, 901 P.2d 1046 (1995).

1. THE TRIAL COURT ERRED BY DEVIATING FROM BINDING STATE SUPREME COURT PRECEDENT THAT HAS REPEATEDLY HELD RCW 10.95.020's SENTENCING FACTORS ARE NOT ELEMENTS OF A BASE OFFENSE AS THEY ONLY INCREASE THE PENALTY FOR A PREMEDITATED MURDER CONVICTION.

It is a central tenant of our federalist system that the effect given to a state statute by the state's highest court is controlling in the courts of the United States. ***S. Branch Lumber Co. v. Ott***, 142 U.S. 622, 627-28, 12 S. Ct. 318 (1892); ***Union Nat. Bank v. Bank of Kansas Cty***, 136 U.S. 223, 235, 10 S. Ct. 1013 (1890); ***Olcott v. Fond du Lac Cty.***, 83 U.S. 678, 689 (1872); ***State v. Gore***, 101 Wn.2d 481, 487, 681 P.2d 227 (1984); *e.g.*, § 4507 *The Erie Doctrine—Determining the Content of the Applicable State Law*, 19 Fed. Prac. & Proc. Juris. § 4507 (2d ed.). United States Supreme Court authority in this context is limited to deciding whether a challenged state statute, as construed by the state's highest court, violates federal law. *Id.*; ***Alabama State Fed'n of Labor, et al. v. McAdory***, 325 U.S. 450, 465, 65 S. Ct. 1384, 1392, 89 L. Ed. 1725 (1945); ***Bailey v. State of Alabama,*** 211 U.S. 452, 457, 29 S. Ct. 141 (1908).

RCW 10.95.020's aggravating circumstances have been construed by Washington's Supreme Court on more than one occasion. According to that Court they are "aggregation of penalty factors which enhance the penalty for [premeditated murder], and not elements of a crime as such." ***State v. Kincaid***, 103 Wn.2d 304, 307, 692 P.2d 823 (1985); ***State v.***

Irizzary, 111 Wn.2d 591, 594, 763 P.2d 432 (1988). This controlling interpretation accords with the statutory scheme's design, which provides three levels of punishment for persons convicted of premeditated murder. Persons convicted of premeditated murder alone are sentenced to life in prison pursuant to RCW 9A.32.040. Persons convicted of premeditated murder where one or more RCW 10.95 aggravating circumstances are found, but the death penalty is not sought or obtained, are sentenced to mandatory life imprisonment. And persons convicted of premeditated murder, where one or more of the RCW 10.95 aggravating circumstances are found, and where the death penalty is sought, are sentenced to death if no mitigating circumstances warranting leniency are found. ***Kincaid***, 103 Wn.2d at 310-11.

The Legislature did not place those aggravating circumstances in Washington's criminal code to create an aggravated murder offense greater than premeditated murder. They began as part of "AN ACT Relating to capital punishment." *Id.* at 309. What is now RCW 10.95.020 emerged from the Act and "defines the aggravating circumstances that make premeditated ... murder punishable under that chapter rather than ... the Sentencing Reform Act of 1981." ***State v. Thomas***, 166 Wn.2d 380, 392, 208 P.3d 1107 (2009). "As aggravation of penalty factors," they are "not elements of a crime ...." *Id.* (citing ***Kincaid***, 103 Wn.2d at 312).

The trial court concluded ***Alleyne*** transformed defendant's RCW 10.95.020 aggravating circumstances into elements of his base offenses.

RP (8/7/15) 13-15. That decision is incorrect since ***Alleyne*** is incapable of overruling our State Supreme Court's binding construction of the statutory scheme created through the state's enactment of a premeditated murder base offense under RCW 9A.32.030(1) and tiered punishment for that offense under RCW 9A.32.040 and RCW 10.95. ***Ott***, 142 U.S. at 627-28; ***Gore***, 101 Wn.2d at 487. So defendant's wrongly dismissed aggravating circumstances remain sentencing factors for double jeopardy purposes.

2. ***ALLEYNE*** WAS MISAPPLIED BY THE TRIAL COURT TO EXTEND UNFOUNDED DOUBLE JEOPARDY PROTECTION TO NONCAPITAL SENTENCING FACTORS IN VIOLATION OF SETTLED DOUBLE JEOPARDY PRECEDENT.

The Double Jeopardy Clause of the Fifth Amendment prohibits the State from prosecuting a defendant for the same *offense* after acquittal. US. Const. amend V. The Washington Supreme Court "has declined to extend double jeopardy protection against retrial to noncapital sentencing aggravators...." ***Thomas***, 166 Wn.2d at 395 (citing ***State v. Eggleston***, 164 Wn.2d 61, 71, 187 P.3d 233 (2008); ***Monge v. California***, 524 U.S. 721, 730, 118 S. Ct. 2246 (1998)); ***State v. Benn***, 161 Wn.2d 2d 256, 263-64, 165 P.3d 1232 (2007); *see also* ***State v. Yates***, 161 Wn.2d 714, 758-59, 168 P.3d 359 (2007). Consistent with that binding precedent, the State is permitted to supplement the record with new evidence on remand to prove sentencing factors it failed to prove in an earlier proceeding. *See* ***State v. Cobos***, 178 Wn. App. 692, 701, 315 P.3d 600 (2013) *aff'd*, 182 Wn.2d 12,

16, 338 P.3d 283 (2014); ***Eggleston***, 164 Wn.2d at 69, 71; ***Benn***, 161 Wn.2d at 264; ***State v. Nunez***, 174 Wn.2d 707, 717, 285 P.3d 21 (2012).

Washington's Supreme Court has rejected defense arguments that the ***Apprendi***, ***Ring*** and ***Blakely*** cases eliminated the difference between offense elements and sentencing factors in noncapital cases. ***State v. Kelley***, 168 Wn.2d 72, 80-84, 226 P.3d 773 (2010)(citing ***Apprendi***, 530 U.S. at 490; ***Ring v. Arizona***, 536 U.S. 584, 122 S. Ct. 2428 (2002); ***Blakely v. Washington***, 542 U.S. 296, 124 S. Ct. 2531 (2004)); *see also* ***State v. Siers***, 174 Wn.2d 269, 280-83, 274 P.3d 358 (2012). Such arguments are recognized to be "based on semantics [that] assign [] unsupportable weight to th[ier] use of the term 'element' to describe sentencing factors" because "[n]one of [them] concern the double jeopardy clause." ***Kelley***, 168 Wn.2d at 81-82 (approving ***State v. Nguyen***, 134 Wn. App. 863, 869, 142 P.3d 117 (2006)). [3]

Defendant nevertheless persuaded the trial court to dismiss his RCW 10.95 sentencing factors by advancing the same semantic argument from ***Alleyne*** even though ***Alleyne*** does not purport to do anything more than extend ***Apprendi's*** holding to minimum penalty factors. ***Alleyne***, 133

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[3] Contrary to defendant's argument below, the double jeopardy holding in ***Sattazahn*** cannot be read as invalidating ***Kelley's*** analysis of double jeopardy's inapplicability to noncapital sentencing factors, for ***Sattazahn*** is a capital case and there is no precedential value assignable to the two-justice opinion, which would have treated the sentencing factors at issue as elements of an aggravated murder offense. ***Kelley***, 168 at 82, n.6-7 (citing ***Sattazahn v. Pennsylvania***, 537 U.S. 101, 111-12, 123 S. Ct. 732 (2003)); *see also* ***State v. McEnroe***, 181 Wn.2d 375, 378-79, 333 P.3d 402 (2014)(death penalty).

S. Ct. at 2163. Identical to its ***Apprendi*** predecessors, ***Alleyne*** is devoid of any reference to double jeopardy or a related analysis one would expect to see if the Supreme Court intended the case to announce a retreat from settled double jeopardy cases that withheld the clause's protection from noncapital sentencing factors. There is no textual basis to support the trial court's conclusion ***Alleyne*** altered the double jeopardy analysis of noncapital sentencing factors in a way our State Supreme Court already held earlier ***Apprendi*** cases could not. ***Kelley***, 168 Wn.2d at 82.

The contours of our Bill of Rights have been and continue to be drawn in increments specific to each amendment. ***Berthold***, 467 U.S. at 157-58; ***Ashwander***, 297 U.S. at 339; ***Sawyer***, 343 U.S. at 594. Once drawn, *stare decisis* requires compelling justification for revision. ***Clay,*** 363 U.S. at 211-12; ***Hilton,*** 502 U.S. at 202; ***Teague v. Lane***, 489 U.S. at 332. There is no reason to assume the Supreme Court abandoned this traditional method of expounding those amendments to indirectly redefine the carefully set boundary of the Fifth Amendment right against double jeopardy through an expedient use of the word "element" in a Sixth Amendment case expanding the jury trial right to minimum penalty factors. *See* ***State v. Witherspoon***, 180 Wn.2d 875, 891-93, 329 P.3d 888 (2014)("improper" to extend ***Alleyne*** beyond its holding "unless and until the United States Supreme Court says otherwise."). So the trial court also

improperly relied on ***Alleyne*** instead of Washington cases relying on ***Monge***—a United States Supreme Court case that construed the Double Jeopardy Clause's application to sentencing factors and held the "narrow exception" which extends its protection to capital sentencing does not apply to noncapital sentencing. ***Monge***, 524 U.S. at 724, 727-28, 732-33; ***Thomas***, 166 Wn.2d at 395; ***State v. Powell***, 167 Wn.2d 672, 687-88, 223 P.3d 493 (2009) o*verruled on other grounds by* ***Seirs***, 174 Wn.2d 276. The holding aligns with "well established" double jeopardy precedent dating back to 1919. ***Monge***, 524 U.S. at 724, 727-28, 732-33 (citing ***Stroud v. United States***, 251 U.S. 15, 18, 40 S. Ct. 50 (1919)).

Monge continues to control with the Washington Supreme Court cases applying it to exclude noncapital sentencing factors from double jeopardy protection. ***Thomas***, 166 Wn.2d at 395; ***McEnroe***, 181 Wn.2d at 385-86. Since defendant's trial court deviated from this precedent, its challenged dismissal of the RCW 10.95 aggravating circumstances should be reversed. ***Roberson v. Perez***, 156 Wn.2d 33, 42, 123 P.3d 844 (2005); ***Coffel v. Clallam Cty.***, 58 Wn. App. 517, 521, 794 P.2d 513 (1990).

3. THE FIRST JURY'S NEGATIVE RCW 10.95.020 FINDINGS WERE WRONGLY TREATED LIKE ACQUITTALS BECAUSE THEIR RETRIAL IS AUTHORIZED BY BINDING PRECEDENT THE TRIAL COURT WAS REQUIRED TO FOLLOW.

"The Supreme Court has held ... the prosecution's admitted failure to prove an aggravating circumstance beyond a reasonable doubt does not preclude retrial of that allegation ... except in the context of death penalty cases." ***Nunez***, 174 Wn.2d at 717-18 (citing ***Monge***, 524 U.S. at 730, 734). "Accordingly, a jury['s] unanimous[] reject[ion] [of] an aggravating circumstance has no bearing on whether [it] may be retried outside the death penalty context." *Id.*; ***Eggleston***, 164 Wn.2d at 69, 70-71.

Defendant's RCW 10.95.020 special verdict forms provided:

> QUESTION #1: Has the State proven the existence of the following aggravating circumstance beyond a reasonable doubt?
>
> The victim was a law enforcement officer who was performing his or her official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the defendant to be such at the time of the killing.
>
> ANSWER #1:_____ (Write "yes" or "no." "Yes" requires unanimous agreement)
>
> QUESTION #2: Has the State proven the existence of the following aggravating circumstance beyond a reasonable doubt?
>
> There was more than one person murdered and the murders were part of a common scheme or plan or the result of a single act of the person.

ANSWER#2: _____ (Write "yes" or "no." "Yes" requires unanimous agreement)

CP 35-38; CP 27.

Defendant's first jury answered each question "no." CP 35-38. On remand, the trial court mistreated those findings as acquittals. RP (8/7/15) at 6-7, 14. This Court should correct the error by reversing the resulting dismissal of defendant's RCW 10.95 aggravating circumstances since even a unanimous conclusion the State failed to prove them has no bearing on whether they can be retried. ***Nunez***, 174 Wn.2d at 717-18; ***Eggleston***, 164 Wn.2d at 67, 71; ***Benn***, 161 Wn.2d at 262-64; (citing ***Polard v. Arizona***, 476 U.S. 147, 155-57, 106 S. Ct. 1749 (1986)).

Reversal is otherwise warranted because the questions posed by the special verdict forms do not support the trial court's interpretation the negative findings declared the jury's "unanimous opinion" the State failed to prove the aggravating circumstances. ***Benn***, 161 Wn.2d at 263-64. As written, unanimity was required to answer the special verdict questions "Yes." CP 35-38. Unanimity was not similarly identified as a requirement to answer "No," making the negative responses equally capable of conveying the jury's inability to reach a decision. Such a "non-result" would not clearly bar retrial of RCW 10.95 sentencing factors in a capital case. *See* ***Sattazahn***, 537 U.S. at 109. And it cannot do so in a noncapital case. ***Nunez***, 174 Wn.2d at 717-18.

E. CONCLUSION

The trial court incorrectly dismissed the RCW 10.95 sentencing factors charged in defendant's case on double jeopardy grounds based on an erroneous belief ***Alleyne*** transformed all sentencing factors into offense elements, thereby vesting them with double jeopardy protection. This Court should correct that error of law by reversing the dismissal and remanding the case for retrial.

RESPECTFULLY SUBMITTED: June 7, 2016.

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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6-7-16 Shereen Kar
Date Signature

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